

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD PHILLIP BURBRIDGE,

Defendant-Appellant.

UNPUBLISHED

June 30, 2005

No. 247816

Wayne Circuit Court

LC No. 02-011791-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RONALD PHILLIP BURBRIDGE,

Defendant-Appellee.

No. 249484

Wayne Circuit Court

LC No. 02-011791-01

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

In Docket No. 247816, defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to six to fifteen years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. In Docket No. 249484, the prosecutor appeals by delayed leave granted the trial court's departure sentence. We affirm defendant's convictions and remand for resentencing.

I. Facts and Procedural History

Defendant's convictions arise from the shooting death of a former boyfriend of defendant's fiancée in Detroit. Defendant and his fiancée stopped seeing each other for many months in 2001, eventually reconciling. During this break in their relationship, defendant's fiancée was involved with the decedent. After defendant and his fiancée reconciled, the decedent allegedly harassed and threatened them.

Defendant admitted that he shot the decedent, but he claimed that on the day of the shooting, the decedent showed up unannounced at the residence defendant shared with his fiancée and refused to leave. Defendant subsequently shot the decedent eight times with an assault rifle. Defendant told the police that he shot the decedent after the decedent opened the trunk of his car because he feared that the decedent was retrieving a weapon. A loaded .45 caliber handgun was found inside the decedent's trunk when the police arrived. The decedent was found with his keys and cellular telephone in his hand.

After defendant filed his appeal, this Court granted his motion to remand for a *Ginther*¹ hearing on the issue of ineffective assistance of counsel. Following an eight-day hearing, the trial court determined that defendant was not denied the effective assistance of counsel.

II. Trial Court's Conduct at *Ginther* Hearing

On appeal, defendant first argues that the judge who conducted the *Ginther* hearing was biased against him and improperly took on the role of the prosecutor by making objections and examining witnesses on her own. To properly preserve this issue, defendant was required to raise this issue below by means of a motion for disqualification. MCR 2.003; *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Because defendant never moved to disqualify the judge who conducted his *Ginther* hearing, the issue is not preserved.² Because the issue is not preserved, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to what defendant argues, the court's questioning of witnesses at the *Ginther* hearing was not improper. MRE 614(b) specifically authorizes a trial judge to "interrogate witnesses, whether called by itself or by a party." Defendant has not identified any specific questions that he claims were improper. The core of his argument seems to be that the court's questioning of witnesses allowed it to obtain answers that he did not want it to have. The trial court's conduct in this regard was understandable, given that it was sitting as the trier of fact, which afforded it greater discretion to question witnesses. *In re Jackson*, *supra* at 29. Concerns about partiality that might otherwise arise at a jury trial, see, e.g., *People v Ross*, 181 Mich App 89, 91-92; 449 NW2d 107 (1989), were not present here. Defendant has not identified any plain error or prejudice arising from the court's questioning of witnesses. *People v Wilder*, 383 Mich 122, 124-125; 174 NW2d 562 (1970).

We also find no merit to defendant's claim that the judge who conducted the *Ginther* hearing was biased against him and should have disqualified herself. "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Defendant's reliance on two

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² We reject defendant's suggestion that this issue is preserved because he moved to recuse the trial judge. Defendant made this motion at trial regarding a different judge and on different considerations. An objection based on one ground at trial is insufficient to preserve an appellate challenge based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

instances where the judge limited testimony concerning the decedent's prior conduct does not demonstrate actual bias. On the contrary, it is apparent that the judge allowed defendant to fully explore his claims of ineffective assistance of counsel during the eight-day *Ginther* hearing. Nor is bias apparent from the fact that the judge did not allow a defense witness to have a glass of water at one point during the hearing. Defendant has not identified any other conduct demonstrating actual bias. He has failed to show any plain error in this regard.

III. Defendant's Proposed Expert Witness

Defendant next argues that the court erred by excluding from the *Ginther* hearing the testimony of his expert witness, who was an attorney. The expert's affidavit was submitted in support of his motion to remand in this Court, and the remand order stated that the hearing was limited to the issues raised in his motion. However, the exclusion of the expert's testimony did not violate this Court's remand order. Although this Court's remand order governed the scope of the issues on remand, it did not specify what evidence could be presented with respect to those issues.

Pursuant to MRE 702, expert testimony may be admitted, "[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" A trial court's decision whether to admit expert testimony is reviewed for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004); *Meehan v Michigan Bell Telephone Co*, 174 Mich App 538, 549; 436 NW2d 711 (1989).

In this case, defendant offered his expert as a witness to testify whether trial counsel's performance met requisite constitutional standards. The trial court was sitting as the trier of fact and, noting that it was familiar with such standards, determined that it did not require expert testimony to assist it in understanding or determining an issue. The trial court's decision is consistent with *Freund v Butterworth*, 165 F3d 839, 863 n 34 (CA 11, 1999), wherein the court concluded that "[p]ermitt[ing] 'expert' testimony to establish ineffective assistance is inconsistent with our recognition that the issue involved is a mixed question of law and fact that the court decides." The court in *Freund* agreed with *Provenzano v Singletary*, 148 F3d 1327, 1332 (CA 11, 1998), that

the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

We therefore conclude that the trial court did not abuse its discretion by excluding the expert's testimony.

IV. Prosecutorial Misconduct

Defendant next raises several allegations of prosecutorial misconduct. We generally review claims of prosecutorial misconduct de novo to determine whether the defendant was

denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defense counsel failed to object to the prosecutor's conduct at trial, we review these claims for plain error. *Carines, supra* at 763; *Ackerman, supra* at 448.

First, defendant asserts that the prosecutor's references to God during closing arguments denied him a fair trial. Defendant is correct that it is improper for the prosecutor to inject God into the proceedings. *People v Leshaj*, 249 Mich App 417, 420-421; 641 NW2d 872 (2002). However, the prosecutor's comments referring to God here were not made in the context of appealing to the jury's religious duty or urging the jury to resolve the issues in the case on the basis of religious beliefs. Because any possible prejudice created by the prosecutor's remarks could have been cured by a timely instruction upon request, reversal is not required on this basis. *Ackerman, supra* at 449. Furthermore, the court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *Matuszak, supra* at 58.

Defendant also contends that the prosecutor improperly expressed his personal belief in defendant's guilt. Because the prosecutor's statements were directed at the evidence and expressed how he believed the evidence demonstrated defendant's guilt, we conclude that the remarks were proper. A prosecutor's use of the words "I believe" rather than "the evidence shows" does not constitute error requiring reversal. *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Defendant claims that the prosecutor argued facts not in evidence during his closing argument when he stated that the decedent and defendant's fiancée continued to see each other after she and defendant reconciled. Our review of the record reveals that the prosecutor argued that defendant could have construed the situation in a way that made defendant believe that his fiancée continued to have contact with the decedent, which could make defendant jealous. This argument was supported by the evidence and reasonable inferences drawn from the evidence and, therefore, was not improper. *Matuszak, supra* at 53.

V. Jury Requests

Defendant next argues that he was denied a fair trial because the trial court failed to respond to the jury's requests for the elements of the charged crimes and the elements of self-defense. Near the end of its final instructions, shortly before the jury began deliberating, the court told the jurors that any further communications would have to occur through notes. At the end of the second day of deliberations, the jury sent a note asking to "see the list of elements." On the morning of the third day of deliberations, the jury sent another note that stated, "need: Self defense element." Approximately an hour after this last note was sent, the jury reached a verdict. There is no record of any response to the jury's notes by the trial court and no indication whether the jury was provided with the list of elements it requested. What is apparent, however, is that the jury was able to reach a verdict approximately one hour after it sent its last request for a list of elements, thereby indicating that it did not require anything further to reach a verdict. On this record, there is no basis to conclude that the trial court erred by refusing to reinstruct the jury, or that defendant was prejudiced by the absence of any reinstruction.

VI. Ineffective Assistance of Counsel

Next, defendant argues that a new trial is required because he was denied the effective assistance of counsel. As previously indicated, the trial court determined, following a lengthy *Ginther* hearing, that defendant was not denied the effective assistance of counsel. Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To show that counsel's representation fell below the standard of reasonableness, a "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). We will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, we will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

We disagree with defendant's contention that counsel was ineffective for failing to present additional evidence of the decedent's history of harassment and threatening conduct toward defendant and his fiancée. Defendant described several prior incidents involving the decedent in his statement to the police, which was read into evidence at trial. Defendant claimed that the decedent called the home repeatedly, to the point that he and his fiancée had to unplug their telephone. Defendant also asserted that someone flattened the tires on his truck and fired gunshots into the bedroom where he and his fiancée were sleeping. Defendant claimed that he followed footprints and tracks in the snow and that they led from defendant's truck to the decedent's house. Defendant described another incident when the decedent followed them in his truck and threatened him with a gun. Defendant also claimed that he had sales receipts showing the damage that the decedent allegedly caused to his home and car. However, there was nothing to indicate that decedent was the one who caused the damage, and trial counsel did not believe the receipts would be helpful because there were no names on them. In addition, the trial court found that some of defendant's stories of harassment were simply not credible, and that it was a matter of strategy not to emphasize those alleged incidents before the jury. We agree that counsel's decisions whether to present additional evidence of other incidents involving the decedent was a matter of trial strategy, and we will not second-guess that strategy on appeal. *Rice, supra* at 445.

Defendant argues that counsel was ineffective by failing to permit him to testify in his own defense. A defendant's decision whether to testify is deemed a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). The record also supports the trial court's determination that defense counsel reasonably decided as a matter of trial strategy that defendant should not testify. Defendant's

police statement was read at trial and contained defendant's description of a long history of harassing behavior by the decedent, and an expression of defendant's fear. Counsel explained that it was a "great statement" because it conveyed everything counsel wanted the jury to know without subjecting defendant to the risk of being effectively cross-examined. Defendant has not overcome the presumption that counsel's strategy was sound.

Defendant also complains that defense counsel failed to obtain a ruling on the record regarding the admissibility of photographs depicting shooting damage that the decedent allegedly caused to defendant's house on the prior occasion. The trial court determined at the *Ginther* hearing, and we agree, that the photographs were not relevant to the charged crimes under MRE 401 because the prior incident was too remote in time to the murder, and the damage could not be connected to the decedent. Even if counsel should have formally moved to admit the photographs, defendant has failed to show prejudice.

Nor was defense counsel ineffective for failing to present evidence that the murder weapon was a single-shot rifle, that defendant had a concealed weapons permit, and that defendant had received training as a fugitive enforcement officer. Counsel explained that this evidence was a "double-edged sword" because defendant fired at least ten rounds at the decedent and counsel did not want the jury to dwell on the number of shots fired. In addition, it would have been to defendant's disadvantage to emphasize that he was required to pull the trigger before each shot. As the trial court found, evidence that defendant had experience and training with firearms could have led the jury to conclude that he had "a greater obligation in not using that weapon." Counsel's decisions whether to present evidence of these matters were clearly matters of trial strategy, which we will not second-guess on appeal.

Defendant also argues that defense counsel was ineffective for failing to call an additional eyewitness at trial. After considering the witness' testimony at the *Ginther* hearing, however, the trial court found that it made the decedent look more like a victim trying to protect himself rather than an aggressor and, therefore, would not have been helpful to defendant. Given the witness' testimony that the decedent was "behind the trunk like hiding . . . I don't know if he was using it for a shield or whatever," the trial court did not clearly err in this finding. Defendant has not shown that he was prejudiced by counsel's failure to present the eyewitness at trial.

Finally, the trial court did not clearly err in finding that defendant's proposed character witnesses would not have been helpful. As the trial court found, their testimony at the *Ginther* hearing indicated that they were unaware of defendant's history with the criminal justice system and did not know defendant very well, thereby making them vulnerable on cross-examination. Thus, defendant has not shown that he was prejudiced by counsel's failure to call character witnesses.

In light of the foregoing, defendant has not established serious mistakes by counsel, whether considered singularly or cumulatively, that deprived him of the effective assistance of counsel. *LeBlanc, supra* at 591-592 n 12.

VII. Cumulative Error

Lastly, defendant claims that the cumulative effect of these errors denied him a fair trial. We review a cumulative-error argument to determine if the combination of alleged errors denied

the defendant a fair trial. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Only the unfair prejudice of several actual errors can be aggregated to satisfy the standards set forth in *Carines*, *supra* at 774. *LeBlanc*, *supra* at 591-592 n 12. Because we have determined above that defendant was not prejudiced by any errors, “this issue is without merit.” *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

VIII. Sentencing

In Docket No. 249484, the prosecutor argues that the trial court erred in sentencing defendant to a term of six to fifteen years’ imprisonment for second-degree murder, which represented a departure from the sentencing guidelines minimum sentence range of twelve to twenty years. We review for an abuse of discretion whether the factors constitute substantial and compelling reasons to depart from the statutory minimum sentence. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3). To be “substantial and compelling,” a reason must be both objective and verifiable. *Babcock*, *supra* at 258. Additionally, it must be a reason that “keenly” or “irresistibly” grabs a court’s attention and is of “considerable worth” in deciding the length of a sentence. *Id.*

In this case, the trial court gave the following reasons on the record and in writing for departing from the sentencing guidelines range: (1) lack of criminal record; (2) employment record; (3) value to the community; (4) rehabilitative potential; (5) reputation for “good values;” and (6) remorse.

Defendant’s criminal record, although objective and verifiable, was taken into account in the scoring of defendant’s prior record variables, MCL 777.50, and, therefore, cannot be used as a basis for departure absent a finding that it was given inadequate weight. MCL 769.34(3)(b). No such finding was made in this case. Defendant’s employment record is also objective and verifiable, but the record indicates that defendant held a job from 1991 until 1996, when he quit. After that, he reportedly received cash payments for part-time work, but did not file any income tax returns. There is nothing substantial and compelling about defendant’s employment record to support a departure from the guidelines. The trial court’s remaining reasons for departure are not objective and verifiable. Therefore, as a matter of law, they are not substantial and compelling. *Babcock*, *supra* at 258. Thus, the trial court erred in departing from the sentencing guidelines range in the absence of permissible substantial and compelling reasons for departure. We therefore vacate defendant’s sentence and remand for resentencing.

IX. Conclusion

In Docket No. 247816, defendant’s convictions are affirmed. In Docket No. 249484, defendant’s sentence is vacated, and we remand for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad